Office-Supreme Court, U.S.
FILED
APR 15 1981
ALEXANDER L. STEVAS,
CLERK

80-1742

No. 80

IN THE

Supreme Court of the United States

October Term, 1980

THE BALTIMORE AND OHIO RAILROAD CO.,
Petitioner

vs.

R. J. DICKEY COMPANY, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GARY F. SHARLOCK, Esquire
DAVID P. HELWIG, Esquire
SHARLOCK, REPCHECK, ENGEL
& MAHLER
3090 U. S. Steel Building
Pittsburgh, Pennsylvania 15219
(412) 391-6171

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

QUESTION PRESENTED

Does the federal common law of nuisance permit the owner of an onshore facility who cleans up a prohibited oil discharge pursuant to the Federal Water Pollution Control Act to recover all or part of its reasonable expense from a private party whose negligent acts and omissions caused the discharge?

TABLE OF CONTENTS

PAGE

Question Presented i

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Statutes Involved 2

Statement of the Case 3

Argument 5

The owner of an onshore facility who cleans up a prohibited oil discharge pursuant to the Federal Water Pollution Control Act possesses a federal common law right to recover its reasonable clean-up expenses from a third party whose negligent acts and omissions caused or contributed to the discharge.

Conclusion 10

Appendix A 1a

Memorandum Opinion and Order of the United States District Court for the Western District of Pennsylvania granting Respondent's Motion for a New Trial.

Appendix B 5a

Judgment Order of the United States Court of Appeals for the Third Circuit affirming the Judgment entered in favor of Respondent.

Appendix C 6a

Order of the Court of Appeals denying Petitioner's Petition for Rehearing.

Appendix D 7a

Verdict on Special Interrogatories rendered at first trial.

PAGE

Appendix E 9a

Order of the District Court entering Judgment on the Verdict rendered by the jury at the first trial.

Appendix F 10a

Judgment on jury verdict entered by District Court following second trial.

Appendix G 11a

Full text of 33 U.S.C. §1251 and §1321.

TABLE OF AUTHORITIES

CASES PAGE

Chicago, M. St.P & P.R. v. United States, 575 F.2d 839 (Ct. Cl. 1978) 7

Complaint of Steuart Transp. Co., 435 F. Supp. 798 (E.D. Va. 1977) 9

Glus v. G. C. Murphy Co., 629 F.2d 248 (3rd Cir. 1980) 8

Illinois v. Milwaukee, 406 U.S. 91, 92 S. Ct. 1385 (1972) 5

Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980) 5

National Sea Clammers Ass'n. v. New York, 616 F.2d 1222 (3rd Cir. 1980) 9

STATUTES AND ACTS

Federal Water Pollution Control Act of 1948, as amended, 33 U.S.C. §1251 et seq. .....passim

Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 862 5

Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91 5

OPINIONS BELOW

The Court of Appeals for the Third Circuit issued a Judgment Order, without Opinion, dated December 4, 1980. This Order appears as Appendix B. The Court of Appeals issued an Order denying rehearing, also without Opinion, dated January 15, 1981. That Order appears as Appendix C. The Opinion of the U. S. District Court for the Western District of Pennsylvania, not reported, appears in Appendix A.

JURISDICTION

The Court of Appeals for the Third Circuit issued an Order on December 4, 1980 affirming the judgment of the District Court. The Court of Appeals denied Petitioner's Petition for Rehearing by Order dated January 15, 1981. This Petition for Certiorari was filed within ninety (90) days of the entry of the Order denying rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Federal Water Pollution Control Act of 1948, as amended, 33 U.S.C. §1251 et seq. (hereinafter referred to as FWPCA), will be generally referred to. Portions of the following sections of that Act which are of particular relevance are as follows:

33 U.S.C. §1251 (a) provides:

> "(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's water. . . ."

33 U.S.C. §1321 (i) provides:

> "(i) (1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b) (3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of War, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing causes. . . ."

The full text of 33 U.S.C. §§1251 and 1321 appears as Appendix G.

STATEMENT OF THE CASE

This case arises from Petitioner's clean-up of a prohibited discharge of "oil" pursuant to the FWPCA. Petitioner, an interstate carrier by railroad, owned and operated a diesel fuel storage and locomotive fueling station near the Monongahela River at Pittsburgh, Pennsylvania. This station constituted an "onshore facility" under the FWPCA, 33 U.S.C. §1321. On April 9, 1976, approximately 155,022 gallons of diesel fuel was discharged from Petitioner's storage tank into the Monongahela River. In accordance with its responsibilities under 33 U.S.C. §1321(b)(3) and §1321(f)(2) Petitioner immediately undertook to clean up the diesel fuel discharge utilizing its own employees and an outside contractor who specialized in such projects. Petitioner spend $357,444.30 in the clean-up effort.

Respondent was a plumbing contractor engaged in performing alterations to Petitioner's facility on the date of the discharge. Petitioner brought this action claiming that the discharge resulted from the negligent acts and omissions of Respondent's employees. Petitioner's Complaint alleged Respondent's negligence and also raised an indemnity clause contained in the contract between the parties as a basis for recovery. These theories of liability were entertained by the District Court based on diversity jurisdiction. 28 U.S.C. §1332. Additionally, at Pretrial proceedings and throughout the trial counsel for Petitioner asserted a separate theory of liability against Respondent for those damages representing clean-up costs arising from Petitioner's fulfilling its responsibilities under the FWPCA. This latter theory of liability invokes federal question jurisdiction. 28 U.S.C. §1331. The negligence and contractual liability theories also sought damages for loss of diesel fuel and for the fine assessed against Petitioner by the

United States Coast Guard pursuant to 33 U.S.C. §1321(b)(6).

At the first trial of this case the jury returned a verdict in favor of Petitioner awarding it damages for the cost of clean-up, loss of diesel fuel and the statutory fine. (The amount allocated to each damage category was stated separately in Answers to Special Interrogatories.) By Answers to the Special Interrogatories on the verdict sheet (Appendix D) the jury specifically found that Respondent had been negligent and Petitioner not negligent. The District Court, however, granted a new trial on the grounds that its instruction that Petitioner might recover even if found to be negligent had been erroneous. At the new trial a second jury returned a general verdict in favor of Respondent. Special interrogatories were not utilized. At the second trial the jury was instructed (in accordance with the Pennsylvania common law of negligence as of April 9, 1976) that any negligence by Petitioner would bar recovery.

Petitioner took a timely appeal to the United States Court of Appeals for the Third Circuit. Petitioner's Appeal contended that: (1) the District Court's original jury instruction was correct with respect to the contractual theory of liability; (2) the District Court's original jury instruction was correct with respect to the FWPCA-related theory of liability; and (3) any error in the jury instruction was totally harmless in view of the first jury's finding that Petitioner had not been negligent. The Court of Appeals for the Third Circuit affirmed the judgment of the District Court by Order dated December 4, 1980. Petitioner's Petition for Rehearing and for Rehearing en banc was denied by Order dated January 15, 1981. Both of the Third Circuit Orders were issued without Opinion.

ARGUMENT

The owner of an onshore facility who cleans up a prohibited oil discharge pursuant to the Federal Water Pollution Control Act possesses a federal common law right to recover its reasonable clean-up expenses from a third party whose negligent acts and omissions caused or contributed to the discharge.

There is a federal common law of nuisance. *Illinois v. Milwaukee,* 406 U.S. 91, 92 S. Ct. 1385 (1972). The federal common law of nuisance is especially applicable to pollution of interstate and navigable waters of the United States. *Illinois v. Milwaukee, supra, Illinois v. Outboard Marine Corp.,* 619 F.2d 623 (7th Cir. 1980). Petitioner asks this Court to take judicial notice of the fact that the Monongahela River, the body of water from which Petitioner removed the discharged diesel fuel, is both interstate (with head waters in West Virginia, flowing thence into Pennsylvania) and navigable.

The federal common law of nuisance "fills the interstices of the [Federal Water Pollution Control] Act." *Illinois v. Outboard Marine Corp., supra,* 619 F.2d 626. In *Illinois v. Outboard Marine Corp.* the Court of Appeals for the Seventh Circuit held that federal common law of nuisance served to effectuate the goals of the FWPCA with regard to an in-state pollution source even if no interstate effects were asserted by the Plaintiff.

"The objective of [the FWPCA] is to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. §1251. In order to attain this objective the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 862 incorporated the provisions of the Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91,

prohibiting discharge of "oil" (including diesel fuel) into the navigable waters of the United States and establishing various liability provisions for such discharges. 33 U.S.C. §1321. Petitioner's prompt action in undertaking clean-up of the subject diesel fuel discharge, although not specifically mandated by the FWPCA, is clearly contemplated by 33 U.S.C. §1321(i) "Recovery of removal costs", which permits the owner or operator of an onshore facility to recover from the United States Government reasonable costs of removing oil from navigable waters "[u]pon establishing . . . that such discharge was caused solely by (A) an Act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing causes."

Proof by the owner or operator of an onshore facility that "the foregoing causes" were the *sole* cause of a prohibited discharge also serves as the basis for alternative relief: (1) by providing a defense to an action brought by the United States Government for removal costs, 33 U.S.C. §1321(f)(2), or (2) by granting the owner or operator of the onshore facility subrogation to the rights of the United States Government to recover removal costs against third parties, 33 U.S.C. §1321(g). Unfortunately, the FWPCA contains no provision for direct recovery by owners or operators of onshore facilities (or by any of the other entities specifically subject to the FWPCA) against third parties for removal costs whether arising solely or partially by the act or omission of third parties. Petitioner contends that recognition of such a right is vital to accomplishing the pur-

poses of the FWPCA and that such a right arises out of the federal common law of nuisance.

The preceding statutory provisions for relief from liability or recovery from third parties are inadequate to accomplish the purposes of the FWPCA because they do not provide an adequate incentive for entities subject to the FWPCA to promptly clean-up discharges. Under the FWPCA these entities act at their peril. Recovery of clean-up costs depends on a subsequent adjudication of sole causation by a third party or force. Reimbursement from the United States Government pursuant to 33 U.S.C. §1321(i) will generally be a very remote possibility in view of the high standards of conduct which are applied to claimants seeking such reimbursement. *Chicago v. M.St. P. & P.R. v. United States,* 575 F.2d 839 (Ct. Cl. 1978) illustrates the stringency of those standards even though in that case the onshore facility owner was able to obtain reimbursement.

The alternative of relying on government agencies, rather than undertaking direct, independent clean-up operations is doubly undesirable. Such reliance inevitably entails administrative delay. Any delay carries the dual likelihood of higher eventual clean-up costs (conceivably exceeding the FWPCA's liability limitation) and, more importantly, a greater chance of irreparable harm to the quality of the Nation's waters. Finally, relegating those subject to the FWPCA to such remedies as may exist by virtue of state law produces a lack of uniformity in this area of vital federal concern as well as substantial injustice in cases such as the present one.

The foregoing considerations demonstrate the necessity of recognizing a federal common law right in

private parties to recover reasonable removal costs from third parties. It is particularly important that this right permit recovery via contribution in instances where facility owners or operators may not be entirely blameless since the FWPCA contains no such provision. An analogous right to contribution under federal common law was recognized by the Court of Appeals for the Third Circuit in favor of an employer who settled a Title VII action and then sought contribution from the co-defendant unions in *Glus v. G. C. Murphy Co.*, 629 F.2d 248 (3rd Cir. 1980). The Third Circuit's analysis of judicial recognition of a federal common law right to contribution applies *a fortiori* to the present case. In *Glus* the need to seek contribution was necessarily predicated upon the employer's own wrongful discriminatory conduct. Under the FWPCA strict liability may apply notwithstanding that the facility owner or operator's conduct was blameless since the burden of establishing causation by a third party or force is placed upon the owner or operator. Further support for Petitioner's contentions is found in the FWPCA's provision that:

> "The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance." 33 U.S.C. §1321(h).

Argument.

In *National Sea Clammers Ass'n. v. New York,* 616 F.2d 1222, 1233 (3rd Cir. 1980), appeal pending, the Court of Appeals for the Third Circuit held "that the common law nuisance remedy recognized in *Illinois v. City of Milwaukee* is available in suits by private parties." In *Complaint of Steuart Transp. Co.,* 435 F.Supp. 798 (E.D. Va. 1977) the District Court apparently would have permitted recovery on the contributory basis asserted herein by Petitioner. Under the facts of that case, however, the District Court found that the party claiming a right to contribution was the sole cause of the discharge in question.

If the right to contribution asserted by Petitioner exists, then the District Court's jury instruction at the first trial was correct with respect to the theory of liability based on this right. The jury was given instructions upon which to determine the negligence of both Petitioner and Respondent and answered a detailed set of Interrogatories in which it found no negligence by Petitioner. Although the instruction was arguably erroneous with respect to Petitioner's other theories of liability, the jury's finding of no negligence by Petitioner established beyond any doubt that such error was harmless and irrelevant. The District Court could simply have molded the jury's verdict accordingly had negligence been found on the part of the both parties. Therefore, the Court of Appeals for the Third Circuit should have reversed and remanded with instructions to enter judgment on the original verdict.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

GARY F. SHARLOCK, Esquire
DAVID P. HELWIG, Esquire
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Gary F. Sharlock, counsel for Petitioner do hereby certify that three copies of the within document have been served on Respondent by U. S. Mail, first class postage prepaid, sent on April 15, 1981 addressed to:

JOSEPH B. BAGLEY, Esq.
P.O. Box 10308
Pittsburgh, Pennsylvania 15234

/s/ Gary F. Sharlock

APPENDIX

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Plaintiff

vs.

R. J. DICKEY COMPANY, INC.,
Defendant

Civil Action No. 77-161 D

Memorandum

BARRON P. McCUNE, District Judge

Dated: March 20, 1980.

We consider the defendant's Motions for a New Trial and for Judgment n.o.v., following a jury verdict for plaintiff.

The plaintiff owns and operates a diesel fueling station located on the Monongahela River at its Glenwood Yards. In order to accomplish certain changes at the fueling station, plaintiff contracted with defendant, in writing, to make the changes. Defendant is a plumbing contractor. The contract contained the following clause:

> "Contractor hereby agrees to indemnify, protect and save harmless railroad from and against all loss of or damage to any property whatsoever, or injury to or death of any persons (including the parties hereto and their respective employees, agents or representatives) and all claims or demands therefor, resulting from any acts or omissions of said contractor, its agents or employees, in the execution of the work or in guarding the same."

Appendix A.

The work was undertaken and on the night of April 8, 1976, large quantities of oil escaped from the fueling station, ran down the bank and into the river, causing the intervention of the federal government and the attendant expense of cleaning up the river under government orders. There was a loss of a large quantity of oil and a civil penalty was assessed against the railroad as well. For the various losses to the railroad, the jury returned a verdict in the amount of $410,065.06. By answering interrogatories, the jury found that the contractor had been negligent and its negligence was a substantial cause of the accident. It also found that the railroad had not been negligent.

During trial there was evidence presented on the basis of which the jury would have been justified in finding both parties negligent. The fueling station consisted of a maze of various pipes, valves and outlets. The contract required a revamping of the system eliminating some underground lines and restoring the operation of a railroad car unloading system and the creation of a new tank truck unloading system. Certain overhead lines were to be installed. The testimony concerned the improper opening and closing of valves, lack of preparation and supervision, and the ignoring of obvious indications of dangers.

The court submitted the case to the jury on the theory of comparative negligence on the basis of the discussion in *Golmes v. Broadhurst,* 394 F.2d 465 (3d Cir. 1967).

In view of the action of the Court of Appeals in *Norfolk and Western Railway Company v. Hardinger Transfer Company, Inc.,* 558 F.2d 1028 (3d Cir. 1976), we

were in error in submitting the case on the theory of comparative negligence and a new trial must be granted.

We conclude that Pennsylvania law applies. In Pennsylvania an indemnitor can contract to be responsible for the negligence of the indemnitee, as well as his own negligence, but the contract must be clear and precise in this respect, *Pgh. Steel Co. v. Patterson-Emerson-Comstock, Inc.*, 404 Pa. 53 (1961). In the contract between the B. & O. Railroad and Dickey, the contractor agreed to be responsible for his own negligence only. It would appear at this time that the defendant's position is correct that the court must instruct the jury that contributory negligence is a bar to recovery by the Railroad, although comparative negligence seems to us a more equitable theory.

The defendant's Motion for Judgment n.o.v. must be denied. Although we might have disagreed with the jury when it found that plaintiff was not negligent, the finding of the jury should not be disturbed in this regard. Such a motion may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. Where there is conflicting evidence, a jury finding should generally not be disturbed and in considering the motion, the court must view the evidence in the light most favorable to the party who secured the verdict, *Fireman's Fund Insurance Company v. Videfreeze Corp.*, 540 F.2d 1171 (3d Cir. 1976).

An order follows.

BARRON P. MCCUNE
United States District Judge

cc: Counsel of record.
Dated: March 20, 1980.

Appendix A.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Plaintiff
vs.
R. J. DICKEY COMPANY, INC.,
Defendant

Civil Action No. 77-161 D

Order

AND NOW, March 20, 1980, the Motion for Judgment n.o.v. is denied. The Motion for New Trial is granted. This case will appear on the next civil jury trial list.

BARRON P. MCCUNE
United States District Judge

cc: Gary Sharlock, Esq.
2970 U.S. Steel Building
Pittsburgh, Pa. 15219

Joseph B. Bagley, Esq.
1224 Frick Building
Pittsburgh, Pa. 15219

Appendix B.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2042

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Appellant
vs.
R. J. DICKEY COMPANY, INC.

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 77-00161)

Submitted Under Third Circuit Rule 12(6)
December 4, 1980

Before: ALDISERT, HUNTER, and HIGGINBOTHAM,
Circuit Judges.

Judgment Order

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,
ALDISERT, J.
Circuit Judge

Attest:

M. Elizabeth Ferguson, Chief Deputy Clerk
Dated: December 4, 1980

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2042

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Appellant

vs.

R. J. DICKEY COMPANY, INC.
(W.D. Pa. Civil No. 77-00161)

Sur Petition For Rehearing

Present: SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,
ALDISERT, J.
Circuit Judge

Dated: January 15, 1981

Appendix D.

(If the answer is NO, do not go to the next question. Skip directly to questions 6, 7, 8, and 9 and answer them. If the answer is YES, go to the next question).

4. Was the plaintiff's negligence a substantial cause of the oil spill? Answer YES or NO on the following line.

.....

(If the answer is NO, do no go to the next question. Skip directly to questions 6, 7, 8, and 9 and answer them. If the answer is YES, go to the next question).

5. In what proportion (stated in percentage) was each party responsible for the oil spill?

Defendant.....%.....
Plaintiff.....%.....

6. What are the Railroad's damages as to the loss of oil? (Stated in dollars).

$47,622.76

.....

7. What are the Railroad's damages as to the clean up of the river for which AMO was hired and paid. (Stated in dollars).

$327,865.75

.....

8. What are the Railroad's damages as to the Railroad's own expenses related to the clean up of the river? (Stated in dollars).

$29,576.52

.....

Appendix E.

9. What are the Railroad's damages as to the assessment which the Railroad paid? (Stated in dollars).

$5,000

.....

.....

.....

.....

.....

.....

.....

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Plaintiff
vs.
R. J. DICKEY COMPANY, INC.,
Defendant

Civil Action No. 77-161 D

Order

AND NOW, November 7, 1979, the verdict of the jury is molded in conformity with the answers of the jury to the questions posed and a verdict is entered for the

plaintiff and against the defendant for the sum of $410,065.06.

BARRON P. MCCUNE
United States District Judge

cc: Gary Sharlock, Esq.
2970 U.S. Steel Building
Pittsburgh, Pa. 15219

Joseph B. Bagley, Esq.
1224 Frick Building
Pittsburgh, Pa. 15219

Appendix F

UNITED STATES DISTRICT COURT
FOR THE WESTERB DUSTRUCT IF OEBBSTKVABUA [SIC]

Civil Action File No. 77-161

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Plaintiff
vs.
R. J. DICKEY COMPANY, INC.,
Defendant

} Judgment

Judgment On Jury Verdict

This action came on for trial before the Court and a jury, Honorable Barron P. McCune, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It Is Ordered and Adjudged that the Clerk enter Judgment in favor of the Defendant, R. J. DICKEY

COMPANY and against the Plaintiff, THE BALTIMORE AND OHIO RAILROAD COMPANY together with costs.

Judgment is hereby entered in accordance with the above verdict.

Dated at Pittsburgh, Pennsylvania, this 6th day of June, 1980.

GILBERT W. CONLEY
Clerk of Court

Appendix G

UNITED STATES CODE, TITLE 33

§1251. CONGRESSIONAL DECLARATION OF GOALS AND POLICY

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be

necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of

Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

June 30, 1948, c. 758, Title I, § 101, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 816, and amended Dec. 27, 1977 Pub.L. 95-217, §§ 5(a), 26(b), 91 Stat. 1567, 1575.

§ 1321. OIL AND HAZARDOUS SUBSTANCE LIABILITY

Definitions

(a) For the purpose of this section, the term—

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

(2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but excludes (A) discharges in compliance with a permit under section 1342 of this title, (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 1342 of this title, and subject to a condition in such permit, and (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of this title, which are caused by events occurring within the scope of relevant operating or treatment systems;

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

(4) "public vessel" means a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(5) "United States" means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership;

(8) "remove" or "removal" refers to removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(9) "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone;

(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

(13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit;

(14) "hazardous substance" means any substance designated pursuant to subsection (b) (2) of this section;

(15) "inland oil barge" means a non-self-propelled vessel carrying oil in bulk as cargo and certificated to operate only in the inland waters of the United States, while operating in such waters;

(16) "inland waters of the United States" means those waters of the United States lying inside the baseline from which the territorial sea, is measured and those waters outside such baseline which are a part of the Gulf Intracoastal Waterway.

(17) "Otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided for by international agreement to which the United States is a party.

Congressional declaration of policy against discharges of oil or hazardous substances; designation of hazardous substances; study of higher standard of care incentives and report to Congress; determination of removability; liability; penalties; civil actions; penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs and alternative remedies

(b) (1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).

(2) (A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone or in

connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(B) The Administrator shall within 18 months after November 2, 1978, conduct a study and report to the Congress on methods, mechanisms, and procedures to create incentives to achieve a higher standard of care in all aspects of the management and movement of hazardous substances on the part of owners, operators, or persons in charge of onshore facilities, offshore facilities, or vessels. The Administrator shall include in such study (1) limits of liability, (2) liability for third party damages, (3) penalties and fees, (4) spill prevention plans, (5) current practices in the insurance and banking industries, and (6) whether the penalty enacted in subclause (bb) of clause (iii) of subparagraph (B) of subsection (b)(2) of section 311 of Public Law 92-500 should be enacted.

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and

Management Act of 1976), in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges of oil into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), where permitted under the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person (A) in charge of a vessel from which oil or a hazardous substance is dis-

charged in violation of paragraph (3) (i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3) (ii) of this subsection and who is otherwise subject to the jurisdiction of the United States at the time of the discharge, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(6) (A) Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. Any owner, operator, or person in charge of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3) (i) of this subsection, and any owner, operator, or person in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3) (ii) who is otherwise subject to the jurisdiction of the United States at the time of the discharge, shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such

charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

(B) The Administrator, taking into account the gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge, may commence a civil action against any such person subject to the penalty under subparagraph (A) of this paragraph to impose a penalty based on consideration of the size of the business of the owner or operator, the effect on the ability of the owner or operator to continue in business, the gravity of the violation, and the nature, extent, and degree of success of any efforts made by the owner, operator, or person in charge to minimize or mitigate the effects of such discharge. The amount of such penalty shall not exceed $50,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, operator, or person in charge, such penalty shall not exceed $250,000. Each violation is a separate offense. Any action under this subparagraph may be brought in the district court of the United States for the district in which the de-

fendant is located or resides or is doing business, and such court shall have jurisdiction to assess such penalty. No action may be commenced under this clause where a penalty has been assessed under clause (A) of this paragraph.

(C) In addition to establishing a penalty for the discharge of a hazardous substance, the Administrator may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

(D) Any costs of removal incurred in connection with a discharge excluded by subsection (a)(2)(C) of this section shall be recoverable from the owner or operator of the source of the discharge in an action brought under section 1319(b) of this title.

(E) Civil penalties shall not be assessed under both this section and section 1319 of this title for the same discharge.

Removal of discharged oil or hazardous substances; National Contingency Plan

(c)(1) Whenever any oil or a hazardous substance is discharged, or there is a substantial threat of such discharge, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conser-

vation and Management Act of 1976) the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

(2) Within sixty days after October 18, 1972, the President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances, pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to—

(A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities;

(B) identification, procurement, maintenance, and storage of equipment and supplies;

(C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil and hazardous substance pollution control equipment and material, and a detailed oil and hazardous substance pollution prevention and removal plan;

(D) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies;

(E) establishment of a national center to provide coordination and direction for operations in carrying out the Plan;

(F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances;

(G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters; and

(H) a system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal.

Appendix G.

The President may, from time to time, as he deems advisable revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

Maritime disaster discharges

(d) Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil, or of a hazardous substance from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provisions of law governing the employment of personnel or the expenditure of appropriated funds. Any expense incurred under this subsection or under the Intervention on the High Seas Act (or the convention defined in section 2(3) thereof) shall be a cost incurred by the United States Government for the purpose of subsection (f) of this section in the removal of oil or hazardous substance.

Judicial relief

(e) In addition to any other action taken by a State or local government, when the President deter-

mines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil or hazardous substance into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

Liability for actual costs of removal

(f)(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous

substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of

competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b) (3) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b) (3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a

facility in any court of competent jurisdiction to recover such costs.

(4) The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

(5) The President, or the authorized representative of any State shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

Third party liability

(g) Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles or stores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such discharge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (c) of this section for removal of such oil or substance and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party under

this subsection. In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C(negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the

United States can show that the discharge of oil or a hazardous substance in violation of subsection (b) (3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

Rights against third parties who caused or contributed to discharge

(h) The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

Recovery of removal costs

(i) (1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b) (3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God,

(B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act, or the Deepwater Port Act of 1974.

(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the funds established pursuant to subsection (k) of this section.

Regulations; penalty

(j) (1) Consistent with the National Contingency Plan required by subsection (c) (2) of this section, as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges or oil from vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulations, shall be liable to a civil penalty of not more than $5,000 for each such violation. This paragraph shall not apply to any owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of subsection (b) of this section unless such owner, operator, or person in charge is otherwise subject to the jurisdiction of the United States. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance, after notification of a violation, shall be considered by the President.

Authorization of appropriations

(k) There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury such sums as may be necessary to maintain such fund at a level of $35,000,000 to carry out the provisions of subsections (c), (d), (i), and (l) of this section. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

Appendix G.

Administration

(l) The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Any moneys in the fund established by subsection (k) of this section shall be available to such Federal departments, agencies, and instrumentalities to carry out the provisions of subsections (c) and (i) of this section. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall, whenever appropriate, utilize the personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

Boarding and inspection of vessels; arrest; execution of warrants or other process

(m) Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issued thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

Jurisdiction

(n) The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i) (1) of this section, arising under this section. In the case of Guam and the Trust Territory of the Pacific Islands, such actions may be brought in the district court of Guam,

and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected

(o) (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

Appendix G.

Financial responsibility

(p) (1) Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil or hazardous substances as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be prescribed from time to time by the President, evidence of financial responsibility of, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator ownes, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

(2) The provisions of paragraph (1) of this subsection shall be effective April 3, 1971, with respect to oil and one year after October 18, 1972, with respect to hazardous substances. The President shall delegate the responsibility to carry out the provisions of this subsection to the appropriate agency head within sixty days

after October 18, 1972. Regulations necessary to implement this subsection shall be issued within six months after October 18, 1972.

(3) Any claim for costs incurred by such vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

(4) Any owner or operator of a vessel subject to this subsection, who fails to comply with the provisions of this subsection or any regulation issued thereunder, shall be subject to a fine of not more than $10,000.

(5) The Secretary of the Treasury may refuse the clearance required by section 91 of Title 46 to any vessel subject to this subsection, which does not have evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(6) The Secretary of the Department in which the Coast Guard is operated may (A) deny entry to any port or place in the United States or the navigable waters of the United States, to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection, which upon request, does not produce evidence furnished by the President that the financial responsibility provisions of

paragraph (1) of this subsection have been complied with.

Establishment of maximum limit of liability with respect to onshore or offshore facilities

(q) The President is authorized to establish, with respect to any class or category of onshore or offshore facilities, a maximum limit of liability under subsections (f)(2) and (3) of this section of less than $50,000,000, but not less than $8,000,000.

Liability limitations not to limit liability under other legislation

(r) Nothing in this section shall be construed to impose, or authorize the imposition of, any limitation on liability under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974.

June 30, 1948, c. 758, Title III, § 311, as added Oct. 18, 1972, Pub.L. 92.500, § 2, 86 Stat. 862, and amended Dec. 28, 1973, Pub.L. 93-207, § 1(4), 87 Stat. 906; Dec. 27, 1977, Pub.L. 95-217, §§ 57, 58(a)-(g), (i), (k)-(m), 91 Stat. 1593-1596; Nov. 2, 1978, Pub.L. 95-576, § 1(b), 92 Stat. 2467.

80-1742

Office-Supreme Court
FILED
MAY 18 198
ALEXANDER L. STE
CLERK

No. 80

IN THE

Supreme Court of the United States

October Term, 1980

THE BALTIMORE AND OHIO RAILROAD CO.,
Petitioner

vs.

R. J. DICKEY COMPANY, INC.,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH B. BAGLEY, ESQ.
JOSEPH M. DIGIORGIO, ESQ.
4156 Library Road
P. O. Box 10308
Pittsburgh, Pennsylvania 15234
(412) 563-4877

Counsel for Respondent

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

COUNTER QUESTION PRESENTED

Does federal common law based on nuisance allow the owner of an onshore facility who cleans up an oil spill to recover its expenses from a private party whose negligent acts allegedly caused the spill when the isolated incident of pollution did not constitute a nuisance; Petitioner never requested the District Court to apply federal common law or determine that the pollution constituted a nuisance; the action involves private parties; there is no basis to seek contribution under Pennsylvania law or the FWPCA; and the application of federal common law to a case between private parties as a result of an isolated incident of pollution which originated on shore will not effect private industry's willingness to shift the burden of clean-up to the government?

TABLE OF CONTENTS

PAGE

Counter Question Presented i

Table of Authorities iii

Counter Statement of the Case 1

Argument 3

There was no reason for the District Court to apply federal common law at the first trial for the following reasons:

1) This isolated incident of pollution did not constitute a nuisance;

2) Petitioner never requested the District Court to either apply federal common law or determine that this pollution constituted a nuisance;

3) This action involves private parties;

4) There is no basis on which to seek contribution either under Pennsylvania law in effect at the time of the discharge or under the provisions of the FWPCA;

5) The application of federal common law to a case between private parties as a result of an isolated incident of pollution which originated on shore will not effect private industry's willingness to shift the burden of clean-up to the government.

Conclusion 7

Certificate of Service 8

Appendix A 1b
Copy of Petitioner's Original Complaint.

Appendix B 6b

Transcript of Pre-Trial Conference taken on August 21, 1978 at the United States District Court, Pittsburgh, Pennsylvania, before the Honorable Barron P. McCune.

Table of Contents.

TABLES OF AUTHORITIES

CASES	PAGE
Georgia v. Tennessee Copper Co., 206 U.S. 230	5
Glus v. G. D. Murphy Co., 629 F.2d 248 (3rd Cir. 1980)	6
Illinois v. Milwaukee, 406 U.S. 91, 92 S. Ct. 1385 (1972)	4, 5
Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980)	4

STATUTES AND ACTS	
Federal Water Pollution Control Act of 1948, as Amended, 33 U. S. C. § 1241 et seq.	6

COUNTER STATEMENT OF THE CASE

Beginning sometime during the evening of April 9, 1976 and continuing into the morning of April 10, 1976, a substantial amount of diesel fuel drained from Petitioner's 50,000 gallon storage tank, proceeded through some open pipes and followed the natural course of gravity through a sewer drainage system and ultimately into the Monongahela River, which is an interstate navigable waterway. The storage tank was located on Petitioner's land at a point approximately one mile from the river bank or shore line. Around the time that the discharge occurred, Respondent was engaged in the replacement of pipes near the storage tank and to facilitate this replacement it became necessary for Respondent's employees to close certain valves. Because the replacement was not complete by the end of the work day, these valves remained closed. During the night, Petitioner's employees opened the valves without realizing that they were allowing the diesel fuel to enter lines that lead to open pipes and consequently caused the spill. The written contract between Petitioner and Respondent pertaining to the pipe work contained a general indemnification clause in favor of Petitioner. Following the spill and the subsequent clean-up efforts, Petitioner brought suit against Respondent demanding indemnification for the costs of the clean-up of the river; the loss of the diesel fuel and the fine imposed upon Petitioner by the U. S. Coast Guard. (See Appendix A). Indemnification provided for on the contract and negligence on the part of Respondent were the only theories advanced by Petitioner in its Complaint and at the Pre-trial Conference before the first trial of the case. (See Page 30b, Appendix B).

At the first trial the District Court applied the law of the Commonwealth of Pennsylvania generally and after the close of the testimony and immediately prior

to the closing arguments, decided to apply comparative negligence in spite of the fact that the spill had occurred prior to the enactment of the Pennsylvania Comparative Negligence Statute, which had been determined to be prospective in its application by the Pennsylvania Supreme Court. The charge of the District Court on comparative negligence placed the entire burden of proof of Petitioner's contributory negligence on Respondent and had the effect of prohibiting Respondent the use of Petitioner's evidence of its own culpability and contributory negligence. Contributory negligence was a complete bar to Petitioner's recovery under the law of Pennsylvania at the time of the spill. The jury returned its verdict at the first trial in favor of Petitioner.

Respondent filed a Motion for a New Trial and brought to the District Court's attention that another Judge of the same District Court had applied comparative negligence in exactly the same manner in an almost identical general indemnification case but not involving an oil spill. In that case, *Norfolk and Western Railway Company v. Hardinger Transfer Company, Inc.*, 558 F.2d 1028 (3d Cir. 1976), the Third Circuit Court of Appeals reversed and entered Judgment N.O.V. for Defendant based on the finding of negligence on the part of the Plaintiff. The District Court therefore awarded the Respondent in the case a new trial but refused to issue a Judgment N.O.V. as there was no finding of negligence on the part of the Plaintiff by the jury at the first trial.

At the second trial the District Court correctly charged the jury on contributory negligence and the jury returned its verdict in favor of Respondent. Petitioner appealed to the Third Circuit Court of Appeals,

which Court having already ruled on the questions involved, affirmed the second verdict and judgment. Hence, Petitioner filed this Petition for Writ of Certiorari with the U. S. Supreme Court.

ARGUMENT

There was no reason for the District Court to apply federal common law at the first trial for the following reasons:

1) This isolated incident of pollution did not constitute a nuisance;

2) Petitioner never requested the District Court to either apply federal common law or determine that this pollution constituted a nuisance;

3) This action involves private parties;

4) There is no basis on which to seek contribution either under Pennsylvania law in effect at the time of the discharge or under the provisions of the FWPCA;

5) The application of federal common law to a case between private parties as a result of an isolated incident of pollution which originated on shore will not effect private industry's willingness to shift the burden of clean-up to the government.

While it cannot be denied that there is a federal common law of nuisance, there exists several obvious and valid reasons why the District Court did not apply federal common law at the initial trial of this matter. The cases cited by Petitioner to support its contention

of the existence of a right of recovery under the federal law of nuisance are distinguishable from this case in regard to the nature and kind of discharge involved. In *Illinois v. Milwaukee,* 406 U.S. 91, 92 S. Ct. 1385 (1972), the cause of action was brought to abate a daily and continual discharge of over 200 million gallons of raw or inadequately treated sewage waste materials into Lake Michigan by several Wisconsin cities. Also, in *Illinois v. Outboard Marine Corp.,* 619 F.2d 623 (7th Cir. 1980) it was the alleged discharge by Outboard Marine Corporation of toxic PCB's over a nineteen year period into Lake Michigan, bounded as it is by four states, which convinced the Seventh Circuit Court of Appeals that federal common law of nuisance should be applied. Both of these cases are distinguishable from the present cases in that the isolated discharge which occurred here is not of the character or degree as the deliberate, *continual* and far reaching discharge which triggered the application of federal common law of nuisance in *Illinois v. Milwaukee* and *Illinois v. Outboard Marine Corp.,* supra.

Assuming even the possibility that federal common law of nuisance might be applicable to this situation, Petitioner should nonetheless be precluded from invoking, for the first time, its application in this case. Petitioner never requested the District Court, either in its Complaint (Appendix A), at Pre-trial Conferences at the first trial or in discussion of Points for Charge to apply federal common law of nuisance. In fact, Petitioner never asked the Court at any point to even make the basic and necessary determination that the discharge which occurred in this case constituted a "nuisance" so as to invoke the application of federal common law. Petitioner's counsel specifically limited its theories of re-

covery at the first Pre-trial Conference to indemnification under the contract and/or negligence on the part of Respondent based on the law of Pennsylvania. (Page 30b of Appendix B).

Respondent additionally advances the argument that this case is unlike the others to which this Court saw fit to apply federal common law of nuisance in that both of the parties to this suit are private parties. In *Georgia v. Tennessee Copper Co.,* 206 U. S. 230, this Court stated:

> "It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, *notwithstanding the hesitation that we might feel if the suit were between private parties,* and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law." Id., at 238. (Emphasis added).

The Court quoted this same passage approvingly in its opinion in *Illinois v. City of Milwaukee,* supra., which concerned interstate waters. In both of those cases, it was the character of one or both of the parties involved, i.e., a governmental entity, which convinced the Court that there was a need to fashion a federal common law right. No such overriding need exists in this suit between two private entities and therefore, there is no

need for this Court to fashion any such common law right.

There is also no possible basis on which Petitioner can seek contribution from Respondent for clean-up costs when the applicable law then in effect in the Commonwealth of Pennsylvania did not permit such a recovery. Petitioner's contention that there exists a federal common law right to private parties to recover reasonable removal costs from third parties analogous to the right to contribution under Title VII recognized by the Court of Appeals for the Third Circuit in *Glus v. G. C. Murphy Co.*, 629 F.2d 248 (3rd Cir. 1980) is incorrect. The Third Circuit's holding in *Glus* that an employer was entitled to contribution from co-defendant unions was reached only after the Court reviewed Title VII to determine the congressional intent. Id. at 255. This was necessary since Title VII did not explicitly indicate whether or not Congress intended for a right of contribution to exist. Whereas, the FWPCA, 33 U.S.C. §1251, et seq., expressly states the Congressional intention as follows;

> "The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance." 33 U.S.C. §1321(h).

Thus the congressional intent not to affect any right of recovery which a party may have against a third party expressed in the FWPCA distinguishes this case from

the *Glus* case where no indication was evident in Title VII itself.

Finally, Petitioner's argument that failure to apply federal common law to a case between private parties as a result of an alleged tort at an onshore facility which caused an isolated incident of pollution will result in an increase in private industry calling upon the government to bear the burden of clean-up is mistaken. Clearly, the incentive for private industry to do the clean-up itself is to control the cost factor and not whether or not there will be an eventual recovery against other parties including the U. S. Government. To argue that application of federal law would be an incentive to private industry to conduct the clean-up is without merit.

Therefore, for the reasons set forth herein, the District Court did not err in applying the law of Pennsylvania. Petitioner does not argue that the District Court misapplied the law of Pennsylvania.

CONCLUSION

For these reasons, a Writ of Certiorori should not issue to review the Judgment of the Court of Appeals for the Third Circuit.

Respectfully Submitted,

By: .....

Joseph B. Bagley
Attorney for Respondent

CERTIFICATE OF SERVICE

I, Joseph B. Bagley, counsel for Respondent do hereby certify that three copies of the within document have been served on Petitioner by U. S. Mail, first class postage prepaid, sent on May 15, 1981 addressed to:

GARY F. SHARLOCK
3090 U. S. Steel Building
Pittsburgh, PA 15219

/s/ Joseph B. Bagley

.....

APPENDIX

Appendix A

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff
v.
R. J. DICKEY COMPANY, INC., Defendant
Civil Action No. 77 16

COMPLAINT

The Baltimore and Ohio Railroad Company, Plaintiff herein, by its attorneys, Sharlock, Repcheck & Engel, brings this action against R. J. Dickey Company, Inc., to recover damages of said Defendant upon a cause of action whereof the following is a statement:

1. The Baltimore and Ohio Railroad Company, Plaintiff herein, is a corporation organized and existing under the laws of the State of Maryland, and is a citizen thereof.

2. R. J. Dickey Company, Inc., Defendant, is a citizen of Pennsylvania, with its principal place of business located at 1110 Saw Mill Run Boulevard, Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania.

3. That jurisdiction in this case is based upon the diversity of citizenship of the parties and the amount in controversy exceeds Ten Thousand ($10,000.00) Dollars exclusive of interest and costs.

4. On June 9, 1975, the Baltimore and Ohio Railroad Company and R. J. Dickey Company, Inc. entered

into a written agreement, a copy of which is attached hereto, and marked Exhibit "A", and made a part hereof.

5. Said written agreement provided for R. J. Dickey Company, Inc. to install certain fuel lines for unloading fuel from tank cars and trucks at the Glenwood Yards of The Baltimore and Ohio Railroad Company, in Pittsburgh, Pennsylvania.

6. Said written agreement provided that R. J. Dickey Company, Inc. would indemnify, protect and save harmless The Baltimore and Ohio Railroad Company for damages sustained by the Plaintiff due to negligent acts of omission or commission on the part of the Defendant.

7. On or before April 9, 1976, the Defendant, through its agents, servants or employees, while in the course of performing its duties, as outlined in the aforementioned agreement, did negligently and carelessly cause an oil spill at the Glenwood Yards of The Baltimore and Ohio Railroad, in Pittsburgh, Pennsylvania.

8. At the time of the aforesaid incident, that is on or before April 19, 1976, the agreement represented as Exhibit "A" was in full force and effect.

9. As a result of the incident hereinabove described, the Plaintiff was caused to incur expenses in the amount of $405,065.06 to remedy and correct the oil spill and the damages caused by it.

10. Since June 11, 1976, the Plaintiff has demanded that the Defendant make payments to it as indemnification for the amounts spent in remedying and correcting the oil spill and the damages caused by it.

11. The Defendant has refused to pay the Plaintiff the sum of $405,065.06 or any sum whatsoever.

WHEREFORE, The Baltimore and Ohio Railroad Company, Plaintiff herein, demands judgment against R. J. Dickey Company, Inc., Defendant herein, in the amount of $405,065.06 plus interest and costs.

SHARLOCK, REPCHECK & ENGEL

By GARY F. SHARLOCK
Attorneys for The Baltimore
and Ohio Railroad Company

EXHIBIT "A"

THE BALTIMORE AND OHIO RAILROAD COMPANY

M: R. J. Dickey Company, Inc.
1110 Saw Mill Run Blvd.
Pittsburgh, Pennsylvania 15226

Dated Jun 11,.....
File: H-4694 ID/82
P-90

Dear Sir(s)

This will constitute a letter form of contract between us (hereinafter referred to as "Railroad" and "Contractor," respectively), when the enclosed duplicate copy thereof duly signed or executed on Contractor's behalf is returned to Railroad, under which contract it is agreed that Contractor, subject to the terms and conditions hereinafter stated, will perform the work listed below at either the rate or contract price (whichever is filled in) shown.

Appendix A.

Location	Facility	Nature of Work	Rate	Estimated Cost	Contract Price
Glenwood, Pa. AFE-55983		Furnish all labor, equipment, materials, etc. to install a 4″ fuel line for tank car unloading and a 3″ fuel line for truck fuel unloading at Glenwood Yard. Railroad will pay contractor the lump sum of Five Thousand Eight Hundred Sixty One Dollars ($5,861.00) upon completion of the work.			

1. Contractor shall perform said work at a time and in a manner satisfactory to Railroad's Division Engineer, and Contractor's bill or bills therefor shall be submitted in triplicate to said Division Engineer.

2. In the performance of said work, Contractor shall be deemed and held to be an independent contractor, and Railroad holds no control over Contractor or its employees other than that the results to be accomplished shall be satisfactory to Railroad.

3. Contractor hereby agrees to indemnify, protect and save harmless Railroad from and against all loss of or damage to any property whatsoever or injury to or death of any persons (including the parties hereto and their respective employees, agents or representatives), and all claims or demands therefor resulting from any acts or omissions of said Contractor, its agents or employees, in the execution of the work or in guarding the same except that Contractor shall not be liable for any damages to real property in the performance of the work herein specified where such damages do not result from accident or from the negligence or carelessness of contractor, its agents or employees.

4. Contractor shall promptly notify said Division Engineer of any loss, damage, injury or death arising out of or in connection with said work.

5. No assignment of this contract shall be valid for any purpose.

THE BALTIMORE AND OHIO RAILROAD COMPANY

By .....
Vice President

Accepted this 9th day of June, 1975

R. J. DICKEY COMPANY, Inc. (Contractor)

By John Glue, President

If signed on behalf of a corporation or partnership, the name and title of the person who signing should be shown.

Note to Contractor: After execution on your behalf, please forward Railroad's copy direct to Mr. J. W. Brent, Chief Engineer, The Baltimore and Ohio Railroad Company, P. O. Box 1800, Huntington, W. Va. 25718.

EXHIBIT "A"

Appendix B

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Plaintiff,
v.
R. J. DICKEY COMPANY, INC.,
Defendant.

Civil Action
No. 77-161

TRANSCRIPT OF PROCEEDINGS of the Pretrial Conference taken in the above-entitled action on August 21, 1978, beginning at 4:00 p.m., at the United States District Court, Pittsburgh, Pennsylvania, before the Honorable Barron P. McCune, District Judge.

Court Reporter: Denise J. Khorey

APPEARANCES:

For the Plaintiff:
Sharlock, Repcheck, Engel & Mahler
3090 U. S. Steel Building
Pittsburgh, Pennsylvania 15219
by Gary F. Sharlock, Esquire

For the Defendant:
Bagley & Weaver
1224 Frick Building
Pittsburgh, Pennsylvania 15219
by Joseph P. Bagley, Esquire
Patrick Loughney, Esquire

Also Present:
John C. Benner
Albert Bobersky

Appendix B.

(The following Pretrial Conference, was held on August 21, 1978, beginning at 4:00 p.m., at the United States District Court, Pittsburgh, Pennsylvania, before the Honorable Barron P. McCune.)

The Court: Let the record show that this is the time set for a pretrial conference in the civil action at 77-161. It is the Baltimore and Ohio Railroad Company versus R. J. Dickey Company. This is a case where the B&O claims a written contract dated June 9, 1975, with Dickey which provided that Dickey would install fuel lines for unloading diesel fuel from tank cars and trucks at the Glenwood yards of the B&O. According to the complaint, the contract provided that Dickey would indemnify the B&O for damages sustained due to the negligent acts of Dickey.

The pretrial statement of the plaintiff alleges first that on April 9, 1976, Dickey's employees were negligent in removing certain valves from three loading stations without capping the openings, and secondly in opening valves located in the B&O pump house leading to the three uncapped openings, and in closing valves in the pump house which furnished fuel to a B&O fueling station, and finally in failing to notify B&O that the valves to the fueling station were closed and the valves to the unloading facilities were open. As I understand it, this caused the fuel oil leak during which about 155,000 gallons of fuel oil went in the river and had to be cleaned up; but, the oil loss amounted to $47,000 and the cleanup costs about $332,000, and the claim is for about $405,000 plus assessment that the Coast Guard made of $5,000.

Now, as I understand it, the defendant counters that on April 8, 1976, defendant's employees did close certain valves, but left the bolts open for the purpose

of demonstrating to anyone coming into the pump house that work was to be done on the valves. This apparently is recited as some kind of notice to anyone coming into the pump house that the valves were being worked on, but they were closed, and during the course of the evening B&O employees opened the valves and the oil traveled into an open sewer, apparently through the pipes which were up at the bolt, and traveled into the river.

The defendant states that the issues are whether or not comparative negligence applies—stated another way, whether the maritime law applies; secondly, whether contributory negligence applies because they allege there was insufficient supervision or training in security and that there was perhaps contributory negligence when the plaintiff opened the valves, which were apparently the ones upon which the bolts were loose.

Third, was the defendant negligent of course and was the negligence the proximate cause of the oil spill? And next whether B&O violated the rules of the Coast Guard or the Environmental Protection Agency—but it is not stated how this would be related to proximate cause—and, then, whether or not B&O is a proper party. It does not seem to me that that is of much consequence.

Finally, whether the damages are reasonable in view of a second oil spill. It is not related in detail what the second oil spill was, but it is alleged that it occurred at Outfall 8. And I don't know from the defendant's pretrial statement how that is related to the first oil spill or whether it is related at all, or whether it was part of the cleanup or whether it caused part of the expense.

So it seems to me that the contract is not denied. It seems to me that the issue raised by the defendant

of course primarily is whether the defendant was negligent, whether its negligence was a proximate cause of the damage; and secondly, whether contributory negligence or comparative negligence applies. Obviously, the railroad would have the burden of proving the contract in the first instance and the negligence of the defendant. I take it the defendant would have the burden of showing that contributory negligence is there. Now, does that state what the lawsuit is about, gentlemen?

Mr. Sharlock: From the plaintiff's standpoint, your Honor, I think you highlighted the essential issues of the case and the facts of the case.

Mr. Bagley: With certain corrections, that basically states what the case is about, yes, your Honor.

The Court: Now, I have attempted to figure out what valves the employees who have been deposed were talking about and how it affected the flow of the oil, but I cannot do it on the basis of what is in the file. At least, I have not been able to thus far. There is a report of a consulting engineer that the defendant hired which does not help much, but it seems to me that somebody first has to explain the effect of closing the one valve, the one on which the bolts were opened, and allowing the other one to remain open.

I gather from the file that the oil could have flowed two ways, depending upon which pipes were open, and when the one valve was closed and the other left open, the oil might have flowed to a place where it was not intended; but, as I understand it, the real problem is or is alleged to be that when the Dickey employees closed the one valve on which the bolts were open it closed off the flow of oil to a location where diesels were

serviced, and during the night it was necessary to service a diesel engine. So the railroad employees opened that valve and serviced the diesel engine.

As I understand defendant's contention, when they opened that valve the diesel flowed to the point where the engine was serviced. Perhaps it was not closed then, but it may be the plaintiff's contention that it was closed and the oil flowed out through the loosened valve. So I am not sure what the mechanics were that are alleged to be the negligence.

It is apparent from the depositions, the ones I have been able to read, that when the Dickey employees left the job with the bolts open they did not tell anybody about that. Whether that is significant, I do not know. So the point is: Does anybody here know exactly what is alleged to have happened? Do you have an idea and can you draw a picture for us? Mr. Sharlock?

Mr. Sharlock: Yes, Judge. We have a working theory of what occurred—

The Court: Now, what was the—

Mr. Sharlock: —the way the demonstrative may be, and we respectfully suggest that for trial purposes we consider a couple of things. One would be a view of the pump house itself. I think that would in itself crystalize the issues, as to which are the important valves in the routing of the diesel fuel from the storage tank to the open stations and also the routing to the diesel refueling station. If you see it on the site, as I think all of us here have had an opportunity to do, that will help a great deal.

The second thing that I recommend—and we have both worked toward this—is either a model be prepared

—which it may not be necessary to use a model—or a flow chart diagram where you can trace the valve numbers and correlate it to what the testimony has been.

Now, unfortunately, some of the railroad employees refer to certain valves using a different numbering system than the defendant's expert has used. So there are two numbering systems, and I am sure that I understand the numbering system used by the defendant's expert, and I can correlate it with the numbers used by my clients. So—

The Court: Let me just ask—

Mr. Sharlock: So we can say—

The Court: Let me just ask a couple, simple questions. Is it your theory that the oil came out through the loosened valve?

Mr. Sharlock: No.

The Court: All right. Is it your theory that—

Mr. Sharlock: It went through the valve, but not through—not in the opening to go through the bolts.

The Court: Well, then, what did the loosened bolts have to do with it?

Mr. Sharlock: All right. The situation to begin with, as it affects this lawsuit, is this was an entirely closed system that—except for the conduct of the defendant—there is nothing our people could have done in that room that would have caused an oil spill, because their every outside location was either capped or had a closed valve on it. There were three stations outdoors away from the pump house and away from the diesel refueling station which the defendant's men cut the re-

moved valves that had been on there. They were to have capped them, but they did not and all three were left open. So that is hazard number one, but so far there is no problem because of two valves inside the pump house that were to be worked on.

Now, inside the pump house one of the valves was to be removed. The second valve was to be a change, was to be made for different routing to the outside. Defendant's employee began the process of opening the bolts on the valve that led to the three stanchions outside. In his deposition, I interpret it that he left the bolts loose so that our people or anyone coming in would instantly recognize that these valves were loose and be on notice by virtue of the loose bolts that there was an open-valve condition. It is our position he also had that valve open that led to the outside, but still our theory is this should have caused him no trouble.

The Court: Even though he left that valve open?

Mr. Sharlock: Even though that valve is open, it should not have caused a loss due to the routing used internally. Now, when he opened the nuts, he had a leakage of oil which he should not have had. He has got trouble. He goes to the next valve and closes it. Which valve he goes to, I am not positive at this moment. I know which one he closed, but I am not positive as to whether he might have closed a second one upstream.

So he shut down our system. So the valves that he closed, any combination of the valves, one or two valves that he closed—not only did it protect his work site, which was the proper thing for him to have done—unnecessary because the original routing was not—he did not have to close the valve off. But he chose to close the

valve, thinking when he broke the bolts or loosened the nuts to break the valve out of the line, thinking he is getting oil from the tank, which I do not believe he was. There was residual oil in the lines, but when he broke that, he was worried that he was going to get a lot of oil on top of him, so he shut off the valve. He did not need to shut that valve off, but he shut it off anyway, but when he did shut off the valve, that also closed down our diesel refueling station located some considerable distance away.

Now, he did not know what he was doing when he shut off that valve. Now, our people come in later that night. They are not getting diesel fuel at the refueling station. They come in and valves are opened inside the refueling station. They are testified to by our people. Now, this has changed the arrangement inside the pump house, and when they opened the valve at first there was some oil leakage where the bolts were loose, but just a minor leakage at that location; and, when the valve at the diesel engines—that is the control valve on the hose right at the entrance—when that was opened and we began to take fuel to the refueling station, the small leak that was observed inside the pump house stopped. He heard the meter running. He knew it was flowing. Now, what he did not know and could not see was that the oil flowing through the valve that had the bolts loosened, was oil flowing throughout underground some distance and then up to the stanchions out of the sight and a distance away from where our men were located. Oil was then flowing through and flowed all night until it was discovered the next day.

The Court: Now, this was not because the bolts were loose?

Mr. Sharlock: No.

The Court: It was because the valve was opened?

Mr. Sharlock: Yes, sir.

The Court: So actually the loosening of the bolts has nothing to do with this.

Mr. Sharlock: Well, it has. Mr. Bagley's argument is that the loose bolts would have been notice to us, and our man did notice oil leaking at that valve, but when we began to deliver diesel fuel to the engines that leak stopped. So the question may be whether our people, seeing a leak at the area of those bolts, should have been on notice that something more dangerous had gone on.

The Court: So is your allegation of negligence that he opened that valve when he—

Mr. Sharlock: It is a series of things.

The Court: —when he did not know the operation of the system?

Mr. Sharlock: Oh, yes. That is one of the elements. The first element is the three outside stanchions that had valves on them which made the entire system closed, so that nothing our men did inside should have made any difference insofar as an oil spill is concerned. There is no combination of valves they might have turned that should have caused trouble, but when the defendant cut off the valves that were outside and did nct cap them, that set up a hazard. Now, there is a way out—

The Court: By cutting off the valves, he left an open pipe?

Mr. Sharlock: Yes.

The Court: I see, and he did not cap those?

Mr. Sharlock: He did not cap them.

The Court: Did he intend to cap them at a later time?

Mr. Sharlock: He was to have capped them later on, but then the arrangement would have been—they had valves on them and the system as it is now installed does not—there is a valve on one and the other two out of service—

The Court: Did the contract call for his capping those three pipes after he cut the valves off?

Mr. Sharlock: The contract does not speak to that, but it is in the depositions. It was understood that they were to have capped those three stanchions. The contract does not go in any details as to how the work was to be done.

The Court: Okay. Then your allegation of negligence, as I understand it, is that he took off, three valves on pipes that led to the outside and left open pipes?

Mr. Sharlock: Yes.

The Court: And then opened the valve on which he was loosening the bolts?

Mr. Sharlock: And then thinking—

The Court: And then unnecessarily closed valves leading to the diesel refueling station?

Mr. Sharlock: Yes, and—

The Court: So that when your employees opened those valves to get fuel during the night and apparently left them open, the fuel ran out through the uncapped pipes and eventually into the river?

Mr. Sharlock: Failing to tell us what had happened.

The Court: Okay. Next question: Do you agree that there is a defense of contributory negligence?

Mr. Sharlock: Yes.

The Court: Okay. Do you contend then that this is a common law negligence and contributory negligence?

Mr. Sharlock: Yes. Well, it is the application of the indemnity agreement. We are not indemnified against our own negligence under the indemnity agreement; therefore, if we were negligent, we can only collect half providing the defendant is also negligent.

The Court: Yes. Well, what I mean is this is not maritime law.

Mr. Sharlock: No, sir. It is not maritime.

The Court: This is strictly common law.

Mr. Sharlock: Common law negligence.

The Court: Common law negligence under the indemnity clause of the contract.

Mr. Sharlock: Yes, sir.

The Court: Do you agree with that?

Mr. Bagley: No, not necessarily, your Honor. I have a question or problem concerning that which I have listed as the first issue.

The Court: Well, if he concedes that there is contributory negligence, aren't you better off than you are under comparative negligence?

Mr. Bagley: Yes, if he concedes there is contributory negligence because this has been—

Mr. Sharlock: No, no.

The Court: No, no. If he concedes that the legal principles to be employed in a charge to the jury is negligence and contributory negligence, aren't you better off than you are under comparative negligence?

Mr. Bagley: Well, possibly that is right, but one of the problems is that we have not demanded a jury trial under the assumption—and possibly I should have demanded one anyhow. I did not under the assumption that the admiralty maritime law would apply to this case, since it certainly involves the river.

The Court: Well, you could ask for a jury trial anytime.

Mr. Bagley: Well, then, I would ask for leave of the Court to demand a jury trial at this time. I realize it is discretionary with the Court, if the Court is going to rule that the law of Pennsylvania applies. Then, we have the contributory negligence theory.

The Court: Oh, no.

Mr. Bagley: On the other hand, if the Court—

The Court: No, no. I am not making any ruling on what applies. On seeking guidance here, it seemed to me when I picked up the file that it was the indemnification clause in the contract that is at issue, and Mr. Sharlock concedes that in order to collect on that clause he has got to show that you were negligent, and he admits that contributory negligence may be a defense. So—

Mr. Sharlock: Only to half the claim. Contributory

negligence in the defense of suit on the indemnity, if we are both negligent, I collect half. If the defendant only is negligent and we are free from negligence, then I collect everything. But if we are—

Mr. Bagley: Let's—

Mr. Sharlock: —both negligent, I collect half under the indemnity position.

Mr. Bagley: Well, that is a new theory to me. I would like to know what authority Mr. Sharlock has for such a theory as that.

Mr. Sharlock: Pennsylvania contractual indemnity proof law.

Mr. Bagley: This is the first time it has been brought up, Judge, and I would have to look into that as to whether or not that is a correct statement of the contractual agreement.

The Court: Well, let me approach it the other way. What authority do you have that this would be maritime?

Mr. Bagley: Well, we have done some research on it. Mr. Loughney is associated with me, and we have been doing some research on it, and we are willing to concede that it is a close question as to whether or not it would be; and, really, I suppose what it amounts to is, from the research that we have done in the different jurisdictions, that each case pretty well stands on its own merits as to which law would be applied.

In this case, the actual spill and the actions of the parties involved occurred on the land away from the river some distance, but then the spill went into the

river, into an interstate waterway covered completely by the Coast Guard and the EPA and also the DER, as far as the land is concerned, so that I think it is a close question. What I was going to suggest is just possibly that. This contract question should be scheduled for an argument whereby we could have the opportunity to present briefs and argue to the Court either way. Possibly we would resolve it in the meantime among ourselves, rather than have the Court try to make a cursory decision under the pretrial conciliation. That way, we could present our briefs including the contract question that Mr. Sharlock has now raised.

The Court: Well, that might be a good suggestion if they are really legal issues.

Mr. Bagley: That is right, your Honor.

The Court: I do not know that they are. I cannot see any maritime law in this since the parties were land-based parties entering into an ordinary contract. The only jurisdiction that the Coast Guard got was after the oil got into the river. They had the jurisdiction under statutes, I guess jointly with the EPA, of ordering a cleanup and what penalty would be assessed, but I don't think that gives maritime jurisdiction to the underlying factors. I may be wrong, and I imagine that it is true that you have a defense of contributory negligence, but I think the law is that under an indemnification agreement it does not go the whole way. At common law, contributory negligence would be a defense to everything.

Mr. Sharlock: That's right.

The Court: But under indemnification I believe that both parties are negligent and recovery is only 50 percent. Are there any other questions of law?

Mr. Bagley: I have listed the issues in my pretrial statement, which the Court already went over, and the only other one would be No. 2 which is really not all that important, and that is whether or not the B&O Railroad is a proper party to be the plaintiff.

The Court: I do not care whether it is B&O or Chessie, and I suppose if B&O is not really the proper party, they could amend anyway.

Mr. Bagley: Possibly. I was thinking of the real party in interest when I listed that as an issue, and if you look at all the depositions, I have made that an issue in all the depositions, trying to find out what the corporate structure was of this company and never did really find out.

The Court: Well, we are going to assure you that Chessie cannot recover twice. In other words, if B&O either wins or loses, that will be the end of it. You cannot come in and claim that B&O was not the right party then; can you?

Mr. Sharlock: Well, I will state for the record what the situation is as far as that is concerned. The Chessie System, Inc., is a holding company. One of its subsidiaries is the Baltimore and Ohio Railroad Company. The Baltimore and Ohio Railroad Company and the Chesapeake and Ohio Railroad Company and several other companies do business under a logo known as Chessie System. That is the corporate situation, but the Baltimore and Ohio Railroad Company owns the property and is a real party in interest in this matter.

The Court: Well, did B&O pay the bill?

Mr. Sharlock: We did.

The Court: Okay. They paid the contractors who cleaned up the river?

Mr. Sharlock: Yes, sir.

The Court: I notice that—

Mr. Bagley: Your Honor, please—

Mr. Sharlock: Do you have any questions about that, Joe?

Mr. Bagley: Yes, because they are a wholly owned subsidiary apparently of the Chessie System.

Mr. Sharlock: No, no, not Chessie System. Chessie System, Inc.

Mr. Bagley: Of the Chessie System, Inc., and I never have been able to find out in all the depositions I took the answers to those questions. As I am saying, nobody locally seems to be in a position to know the corporate structure.

Mr. Sharlock: Well, don't ask plumbers.

The Court: Well, is it really a subsidiary instead of a division of Chessie? If it is a subsidiary, then it has a corporate character of its own.

Mr. Bagley: I don't know, your Honor.

Mr. Sharlock: It is a subsidiary and I think, if counsel cares to check on the second floor of the Frick Building in the financial library, all that is spelled out in the various encyclopedias that are there. I have looked at it a number of times. It is correct as to the corporate structure.

The Court: Well, Standard & Poor's would give you the—

Mr. Sharlock: Standard & Poor's, yes.

The Court: —the corporate structure.

Mr. Bagley: You asked, your Honor, if there were any other legal questions and I think there is another one, and that is the effect of the violation of the rules and regulations of the EPA or the Coast Guard and whether or not, if there were such violations, they were proximate cause of the spill or were related to the spill, whether or not they would constitute negligence per se, and I think that is a very important legal determination.

I think that is a question for the Court. I think that is very important because the research that we have done and the material we have indicates that in oil spills or fuel spills the violation of those rules and regulations are to be considered as negligence per se, which would establish in itself the contributory negligence of the plaintiff.

The Court: Well, that may be, but your pretrial has not set forth what the regulations were or how they were violated.

Mr. Bagley: Well, one of the reasons for that, Judge, was I just got today—and I have demanded on numerous occasions—Mr. Sharlock in his defense has demanded some things from me too, which he did not get until just recently—was the SPCC regulations or the plan that has to be approved by the EPA, and without that I could not make a determination whether or not there were violations of the rules.

I will state, as we both know from the Coast Guard reports, that the plaintiff was fined $5,000 by the Coast Guard for violations of various other regulations. Now,

we do have that one. There was a violation of that. Without the SPCC, I was unable to determine how much of this they violated. For example, they have to have a dike, which they did have around this tank. They have to remove any oil, or possibility of, into open sewers by so many feet. I could not determine that, and the SPCC plan has to be approved by the EPA, which they did have and apparently was approved.

Now, whether or not it was violated, I could not tell and include in my pretrial statement because I just got it from Mr. Sharlock today.

The Court: Well, in other words, there was a listing of regulations governing the diesel pumping system.

Mr. Sharlock: There are regulations that require the plaintiff to submit a plan for this type of problem, which was done. I don't think that—what you received is not the regulation, but the plan which the railroad prepared in compliance with the regulation.

Mr. Bagley: That's right.

The Court: Was it approved?

Mr. Sharlock: Yes.

Mr. Bagley: Yes. Now, whether that—

The Court: By the EPA?

Mr. Sharlock: Yes.

Mr. Bagley: Whether that plan was violated or not, I could not determine because I just received it before we walked in the door—

Mr. Sharlock: Well, now, I think—

Mr. Bagley: Of course, I have not studied it yet,

which is involved in there. We do know, however, there was a fining of $5,000 levied by the Coast Guard which also leads me back to the first question of maritime law, when they imposed a fine on the plaintiff for violation of various federal regulations regarding the storage of oil or fuel.

The Court: Well, you may have something if you could show that the plan was violated and that was a proximate cause of the damage.

Mr. Bagley: That's right, your Honor.

The Court: But—

Mr. Bagley: I could not do that until today because I did not receive it until just now.

Mr. Sharlock: Well, I think on this particular subject I am sure the Court is aware that anyone who allows certain categories of chemicals to enter the rivers in this area is fined, irrespective of negligence, irrespective of care, irrespective of good faith actions taken by property owners, and so those fines are not at all related to any negligence.

The Court: It seemed to be a small fine.

Mr. Sharlock: If you are fined, no matter what happens, even if it is the fault of a third party—

The Court: It seems to be a small fine in view of the magnitude of the problem.

Mr. Bagley: That's right.

The Court: I would have thought the Coast Guard would be outraged.

Mr. Sharlock: Well, I would think what we should do, then, is to bring representatives of the EPA in who

did not sue us for polluting the rivers in this area and I have been through situations where there was unintentional oil spills and, despite the good will and the efforts of the railroad to control matters like this, we have had suits against us for a couple hundred thousand dollars and where no negligence is involved. So I am sure counsel will explore that issue very thoroughly.

Mr. Bagley: That is a shocking statement.

The Court: Well, let me—

Mr. Bagley: But I was only putting out to the Court that I think that is another legal argument for the Court.

The Court: Well, we will give you time necessary to develop it, but let me raise another question here. You dispute the reasonableness of the damages. Is that a serious dispute? In other words, it seemed to me that the bulk of the damages are composed of two items: The oil that was lost and the contractor's charge to clean it up. Now, I would assume that the contractor charged the going price, and B&O apparently had to get the work done and paid the bill. Do you have any real dispute that the bill was unreasonable?

Mr. Bagley: Yes, your Honor. I think that there are numerous items—of course, there are very lengthy invoices that are either not necessary or were not necessary, such as purchasing new boats to go out in the river. Maybe they were. I am raising this as an issue, as to whether or not these were necessary to the cleanup operations.

One of the major questions again involves the Coast Guard, and my understanding is that there are two ways

of doing this. One is for the plaintiff, being the railroad, to have volunteered to go ahead and have this cleanup done, which they so did; or, the other way to do it is to turn it over to the Coast Guard and let them do it.

Mr. Sharlock: You do not have enough coverage to let them do it. Excuse me, Mr. Bagley. That is a fact.

Mr. Bagley: Well, I think that the Coast Guard would seriously dispute that, and the reason we have listed them as witnesses—one of the reasons beside their investigation—is exactly that reason as it relates to damages because apparently Mr. Sharlock does not have much faith in our Coast Guard and fines to begin with, which shocks me—why they would levy a fine for no reason—and even less respect for their ability to do this type of work or to have it done at a much lesser price than some private contractor who obviously, knowing he has an emergency situation, will take advantage of the situation.

So, yes, we seriously dispute the amount of the damages.

The Court: Okay. Going back to legal questions then, how much time do you want to determine whether the plan was violated and whether it was the proximate cause of the oil spill?

Mr. Bagley: Well, of course we always have pressures this time of the year. We start getting into the actual trials at Common Pleas Court and other jurisdictions the first week in September, so I would request 30 days.

The Court: Okay. No problem. Put this on the pretrial transcript. We will give defendant 30 days to en-

gage in any investigation he wishes concerning the EPA plan, if they need to file a supplemental pretrial statement—

Mr. Bagley: That is the SPCC plan, your Honor.

The Court: All right. —at the end of the 30 days. Furthermore, if the defendant really wishes to brief the issue whether maritime law governs, he may do so within the same 30 days and file any motion to bring the issue to a head. He may also brief the indemnification issue; to wit, whether contributory negligence would limit recovery to 50 percent as Mr. Sharlock contends or not.

Mr. Sharlock is then extended 30 days at the end of the first 30 days where he can reply to the motions.

The reason I am giving you the 60 days is, if this is to be a jury trial, I will not be trying it anyhow in 60 days. Now, do you really want a jury trial? If you make the motion, I will grant it.

Mr. Bagley: Yes, your Honor.

The Court: Because I cannot deny it even if I wanted to.

Mr. Sharlock: I think it has been waived by not demanding the jury trial with the complaint, and I made that decision when we filed our complaint, not to demand a jury trial. Due to the nature of the claim, the amount of the claim and respective impressions that the parties would have on a jury trial, I did not demand a jury trial. I think it is waived.

The Court: I do not think I can deny him a jury trial. I do not particularly want to, but I will say I don't think I can deny it anyhow.

Mr. Sharlock: I think it is waived, your Honor.

The Court: Well, you can present your brief on that within 30 days, if you want to.

Mr. Sharlock: Sure.

The Court: But I do not think I can deny anyone a jury trial that requests it at pretrial.

Mr. Bagley: Well, I will so make the demand at this time, your Honor, for a jury trial in the event that the Court determines that the law of Pennsylvania applies and not the maritime law. If the Court determines that maritime law applies, my understanding of maritime law is that it is automatically non-jury anyhow, so therefore it would be a moot question.

The Court: It seems to me you are arguing an inconsistent position. You are arguing that maritime law applies, but you do want a jury trial.

Mr. Bagley: I can well realize why the Court would feel that it is inconsistent, but I do not believe that it necessarily is. What I am saying is: If that is the determination of the Court, of course I am satisfied with that and that is why we did not demand a jury trial to begin with. Now, if on the other hand the Court determines that the Pennsylvania law should apply, then I would request a jury trial.

The Court: Well, the Pennsylvania law I am talking about is not the new comparative negligence act; you understand?

Mr. Bagley: That's right, your Honor, because this was before that statute.

The Court: Well, even if it was after the statute, I don't think it would have any effect on this case because this is not an ordinary negligence action.

Mr. Sharlock: This is a suit on a contract.

The Court: This is not double indemnity. This is really a breach of contract action.

Mr. Sharlock: That's right.

Mr. Bagley: Well, I do not want to take the Court's time now to go into that contract because you have given us 30 days to make our determination and file our brief concerning the contract. I wonder if the relevancy of the contract in this particular issue—when you are talking about indemnification for negligence, well then they still have to prove negligence, and the only relevancy would be unnecessary indemnification, and one of the matters—which does not come up legally, I suppose, but I may as well tell the Court—that I will have to determine is the carrier with contractual liability in that event, which has come as somewhat of a surprise to me here today; and, what I am talking about is that, if there is liability for 50 percent, that is solely on the basis of the indemnification contract, and this company that I represent—being Northwestern National Insurance Group and Crum & Forster—does not have contractual coverage, then we are leaving the defendant without any insurance.

The Court: Well, you may be.

Mr. Bagley: That is a matter I will have to get into also.

The Court: Well, you may be leaving them without insurance depending upon how their policy reads, I suppose. You raised that, didn't you, in your pretrial statement, that there may not be?

Mr. Bagley: That was for a different reason, your Honor.

The Court: In the interrogatories rather than the pretrial statement?

Mr. Bagley: Right, in the answers to interrogatories, because there is an exclusion under the policy dealing with railroads. Any work done on railroads, which I have quoted the language, and of course obviously you have already read it—but that is an entirely different issue than the contractual liability insurance under a general liability policy.

The Court: You are thinking that maybe in answer to the question: Does defendant's insurers contest coverage afforded by its policy of insurance and, if so, state the reason for any reservation of rights? You answered yes. I take it that means yes, they do contest enforcement of the policy provided it is understood and agreed that this policy excludes coverage to any repair or any contractual agreements to any railroads.

Mr. Bagley: That's right, your Honor.

The Court: Maybe you do not have any insurance at all here.

Mr. Bagley: This is what I am saying to you. Now, that was really put in there on the basis of an ordinary negligence situation. As I understand this pretrial conference, what I am getting out of it is the plaintiff is limiting the theory to a right under the contract for indemnification.

Mr. Sharlock: No, sir. There is a suit on the contract and also a suit sounding in negligence.

That is why, if you will notice, my pretrial statement specifically spells out two separate theories.

Mr. Bagley: Well, now, if you have the one, can you have the other?

Mr. Sharlock: Yes, sir.

Mr. Bagley: Where does that put us in?

Mr. Sharlock: It puts you in coverage. That's what it does.

Mr. Bagley: With respect to the insurance?

Mr. Sharlock: I have both—

Mr. Bagley: Now, I am looking at the verdict, Mr. Sharlock. If the verdict is for the plaintiff against the defendant solely on the basis of the contract—

Mr. Sharlock: It could find for both reasons.

Mr. Bagley: No. Then it would have to be for the full amount. If the verdict should be for 50 percent because of the indemnification contract and the Court should so rule, legally under your theory then you do not have any insurance coverage.

The Court: Well, you have got 30 days to file any motions you want to file and Mr. Sharlock has 30 days, and let me go off—

Mr. Sharlock: Your Honor, we have requested certain reports and photographs referred to in Dr. Hockenberry's report which Mr. Bagley has agreed to furnish us. Upon receipt of those, I would like to take Dr. Hockenberry's deposition. Now, depending on whether this case is going to be tried before a jury or not, it would give me some guidance as to whether I should use a

model of the piping system or schematic drawing of the piping system. So I would like to reserve the right to go either way, and I do not think that will delay the trial any.

The Court: We will give you the right to—

Mr. Sharlock: But, to explain that, I may need one of our persons who is already listed as a witness, who would be explaining it and interpreting it. So that I feel in proper compliance with the rules, I should have a written report and will furnish you a copy of that report as soon as it is prepared in that connection.

Finally, we have been attempting to locate a former employee of the defendant, a Mr. Sunder—S-u-n-d-e-r—and if he can be located, we would want leave to take his deposition. But as of now Mr. Bagley has assured me that his client cannot find him or does not know where he is, and we have been unable to locate him, but we are going to continue our efforts. If we do snag him, I would like to take his deposition.

Mr. Bagley: Well, I have listed in the answers to interrogatories in front of the Court the last known address of Mr. Sunder that we have, and that is all we know about him. He does not work for the company any more. He is gone.

The Court: Well—

Mr. Bagley: If he is located, I have no objection to his deposition as a witness.

Mr. Sharlock: Okay.

Mr. Bagley: Now, but to Dr. Hockenberry's deposition, he is our expert. The plaintiff has not chosen to

have any expert, and his deposition would have to be limited to only factual observations. He would not be permitted to ask Dr. Hockenberry any opinion questions or otherwise. And Mr. Sharlock already has all of that in his report which is quite detailed and very thick, to attest to the defendant's pretrial statement.

It is the same category as taking a doctor's deposition, the doctor of the plaintiff so to speak or a doctor of the defendant, and he does not have an absolute right to ask him any questions, but just probe questions and not getting into any opinions and just asking him for factual observations only, all of which he already has.

So, therefore, I would object to the deposition of Dr. Hockenberry and I do not object to Mr. Sunder's, if they can find him.

Mr. Sharlock: With reference to Dr. Hockenberry's deposition, it was received not too long ago and just before we all were going on vacations, quite a comprehensive report which I have pored through a number of times and have forwarded to my people for analysis. Unfortunately, I do not have a report back from them, and there is some questions in my mind about what Dr. Hockenberry is referring to. I would like leave to take his deposition, and I believe under federal discovery rules, unlike our Common Pleas rules, I am permitted to ask discovery questions. I would like the Court to rule on it, if the Court allows me to take his deposition.

The Court: Well, why don't you get the photographs that you are going to get from Mr. Bagley? If you want to take his deposition then—you may not want to after you get all the factual information.

Mr. Sharlock: That may well be.

The Court: And if you are in disagreement about the deposition, I will settle the issue if you want to come in.

Mr. Sharlock: Thank you.

The Court: I have an idea you can agree on it. You can certainly take the deposition of the other employee if you can find him. We will give you that leave, and as far as that is concerned, during this 60 days that you gentlemen are going to file supplemental pretrial statements, if there is any discovery that is important to either of you, I take it you could engage in it.

Mr. Sharlock: Thank you, Judge.

The Court: As long as it is not burdensome. Anything else?

Mr. Sharlock: No.

Mr. Bagley: Nothing, your Honor.

(Whereupon, at 5:05 p.m. the pretrial conference was concluded.)

Appendix B.

REPORTER'S CERTIFICATE

I, Denise J. Khorey, Court Reporter, do hereby certify that the foregoing is a true and correct transcript made from my stenotype notes of the proceedings held on August 21, 1978, at 4:00 p.m., United States District Court, Pittsburgh, Pennsylvania, before the Honorable Barron P. McCune.

DENISE J. KHOREY
Court Reporter

September 15, 1978
Pittsburgh, Pennsylvania